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In The Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP and WILLIAM VON WINKLE,

Petitioners,

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

BRIEF OF *AMICUS CURIAE* MAYOR AND CITY COUNCIL OF BALTIMORE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS

The petitioners have asked this Court to hold that, as a constitutional matter, economic development is not a "public use," and, therefore, that governments may not exercise the power of eminent domain for the "sole purpose" of economic development. The Mayor and City Council of Baltimore (the "City of Baltimore" or the "City") respectfully submits this brief in support of respondents, because the petitioners' proposed restriction of the concept of "public use" would have a profound adverse impact on economic and urban development in Baltimore and in other cities around the country.[1]

Over the last fifty years, the City of Baltimore has undertaken an ambitious program of urban renewal. The centerpiece of this process was the transformation of the city's Inner Harbor, over several decades, from a largely (but not completely) blighted remnant of nineteen and early twentieth century mercantile activity into what is now sometimes described as the city's "front porch."

Today, the Inner Harbor attracts millions of local residents and visitors each year; it is the home of the National Aquarium, the Maryland Science Center, the American Visionary Arts Museum, the Rouse Company's two glass pavilions at water's edge known as Harborplace, several of the most prominent office towers in the Baltimore skyline, a number of successful hotels, and an assisted living facility serving hundreds of low-income

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[1] Pursuant to Supreme Court Rule 37.4, consent to the filing of this brief is not required as the brief is submitted on behalf of the City by its authorized law officer, the City Solicitor.

senior citizens; it has been a magnet for private development downtown; it has been the impetus for the creation of tens of thousands of new private sector jobs; and its impact has spread outward, allowing, among other things, for the development of Oriole Park at Camden Yards just a block beyond the boundaries of the Inner Harbor West renewal area. In 1984, the American Institute of Architects described the Inner Harbor as "one of the supreme achievements of large-scale urban design and development in U.S. history."

While the removal of blight was an important impetus for the redevelopment of the Inner Harbor, removing blighted properties was only the prelude to the achievement of the project's central objectives of revitalizing the city's downtown and reviving its economy. Today, the achievements of the Inner Harbor project are not understood primarily in terms of numbers of blighted properties removed, but rather, far more broadly, in terms of positive economic development – jobs created, investment dollars attracted, tax revenues generated, and public institutions built – as well as being an enormous source of civic confidence and pride.

As the City looks ahead, it must address a new, but related set of challenges. There are neighborhoods in Baltimore, only a few miles from the Inner Harbor, that demonstrate as well as any in the country the consequences for residents of being isolated, over many decades, from any substantial economic development. In these neighborhoods, as in parts of every other industrial city in the country, the absence of economic development – the disappearance of jobs – has been at the root of an array of social problems that are now not easily solved. *See* William Julius Wilson, *When Work Disappears: The World of the New Urban Poor* (1997). The cycle of disinvestment and joblessness has affected an ever-larger swath of urban geography over the last thirty years. *See id.* at 14 (reporting that, in the nation's one hundred largest cities, one in seven census tracts is at least forty percent poor, more than double the proportion in 1970).

The City of Baltimore has an intense interest in the outcome of this case because this Court's decision will have far-reaching ramifications for the City's much-needed economic development activities. Petitioners' arguments, if accepted, would threaten the ability of Baltimore and other cities to use the power of eminent domain to stimulate economic development in places where, for many decades, there has been little or no such development. If cities are prohibited from using the power of eminent domain to stimulate economic development, then cities will not develop; and if cities do not develop, if they do not adapt to changing times and changing economic circumstances, city residents suffer.

SUMMARY OF ARGUMENT

The petitioners ask this Court to hold that economic development alone is not a "public use" under the Takings Clause. The apparent simplicity of the petitioners' proposed holding is based, in turn, on an equally simple, but misleading premise: that urban renewal (the removal of urban blight) and economic development are distinct processes, the former being a legitimate "public" purpose, the latter not. This premise does not fit with actual patterns of development and abandonment in American cities, particularly older industrial cities like Baltimore. In these

cities, urban renewal and economic development are almost always inextricably linked. It is the absence of economic development that gives rise to urban blight and to the need for urban renewal.

The petitioners' reliance on their neat (but untenable) distinction between urban renewal and economic development allows them to avoid having to ask this Court explicitly to overrule its decision in *Berman v. Parker*, 348 U.S. 26 (1954). However, the petitioners make a number of arguments that, upon close examination, strike directly at the core of the opinion in *Berman*. These arguments, if adopted by this Court, would erect substantial, perhaps insurmountable, barriers to the achievement of projects on the scale of Baltimore's Inner Harbor.

Most importantly, the petitioners would drastically reduce the deference that the courts now afford to legislative determinations that the acquisition of a particular property is for a "public use." Under the petitioners' formulation, a determination by an elected legislature, such as the Baltimore City Council, that the condemnation of property serves a public purpose represents "a mere *claim*," *see* Br. of Pet. at 48 (emphasis in original) – a "claim" that would be subjected to ultimate verification by the courts.

Further, the petitioners identify two particular applications of this principle of legislative deference with which they particularly take issue. First, the petitioners would require the government to certify, "at the time that condemnation is sought," *see* Br. of Pet. at 42, the specific future use of particular parcels of property within an area slated for redevelopment. Although the City of Baltimore had well-defined plans for the redevelopment

of the Inner Harbor when, in 1967, the City Council enacted an ordinance that made hundreds of properties around the Harbor subject to condemnation, those plans were refined further over the course of the next two decades. A certain amount of flexibility is crucial to the success of urban development projects, particularly those on the scale of Baltimore's redevelopment of the Inner Harbor.

Second, the petitioners' arguments seek to undermine the core holding of *Berman*. The petitioners maintain that "there is nothing in the act of condemning *non-blighted* properties that constitutes a public purpose." Br. of Pet. at 26 (emphasis added). The petitioners then proceed to argue that this Court should not permit the condemnation of "viable businesses" and "viable homes." *See id.* at 33. In other words, the petitioners at times argue for a regime under which an owner of any "viable" property in an otherwise blighted area could obstruct the implementation of an urban renewal plan, and under which the government would have to demonstrate the non-viability of each individual property that it seeks to condemn pursuant to an urban renewal plan. Although the Inner Harbor renewal area was characterized predominantly by blight, there were at least marginally viable commercial and residential properties on almost every block within the renewal area. The project would literally have ground to a halt if the owners of those properties had been permitted to refuse to relinquish their properties for just compensation.

This Court should reaffirm both the principle enunciated in *Berman v. Parker* that legislative determinations of "public use" are entitled to deference and *Berman*'s

particular application of that principle in the context of urban renewal.

ARGUMENT

I. Baltimore Revitalized its Downtown, and Rebuilt its Inner Harbor, According to the Constitutional Blueprint of *Berman v. Parker*.[2]

A. Baltimore develops around its harbor.

Founded in 1729 around what is today the Inner Harbor, the City of Baltimore was one of hundreds of settlements in Maryland and Virginia established during the colonial period along the Chesapeake Bay and its tributaries. Annapolis (1649) and Richmond (1737) became state capitals, but Baltimore became the Chesapeake's largest city and major industrial center. Throughout its history, Baltimore's economy had been linked to the productivity of the harbor. Between 1790 and 1800, after independence from Britain had removed the imperial straitjacket on international trade, Baltimore's harbor boomed, and its population doubled. Perhaps the most prominent witness to the harbor's development in the

[2] Except where noted, the facts in this section are drawn from discussions with M. J. Brodie, former Baltimore City Commissioner of Housing and Community Development and current President of the Baltimore Development Corporation; Martin L. Millspaugh, Chief Executive Officer of Charles Center-Inner Harbor Management, Inc. from 1965 to 1985; and Norman Waltjen, former general counsel of Charles Center-Inner Harbor Management; from city records; and from the following written materials: Martin L. Millspaugh, *The Inner Harbor Story*, Urban Land, April 2003, at 36; Baltimore City Department of Planning, *The Baltimore Harbor* (1985); and C. Fraser Smith, *William Donald Schaefer: A Political Biography* (1999).

early nineteenth century was Frederick Douglass, who learned to write in the 1820's, while still a slave, in the course of his work as a carpenter's assistant at Durgin and Bailey Shipyard at Fell's Point. *See* Frederick Douglass, *Narrative of the Life of Frederick Douglass: An American Slave* (1845).

Eventually, the city developed on all sides of the Patapsco Basin, with more than 40 miles of waterfront, most today still dedicated to shipping and trade. The Inner Harbor comprises about 1.5 miles of waterfront at the end of the Basin's most protected finger of navigable water.

B. The Maryland Court of Appeals holds that the City may acquire property by eminent domain to promote harbor development.

The City of Baltimore has exercised its power of eminent domain for at least eighty years to promote economic development in the harbor. In 1920, the Maryland General Assembly authorized the City to borrow $50 million "for developing, extending, and improving the harbor of Baltimore and its facilities," and in 1924, to further this objective, the City's Port Development Commission acquired by eminent domain 5.75 acres of land on the southwest shore of the Patapsco. In condemnation proceedings, the owners of the property objected on the grounds that the development of the harbor generally was not a "public purpose," and that the leasing of specific portions of the property to other private owners for their exclusive use also rendered the taking not for a public purpose.

The Court of Appeals of Maryland rejected both of these arguments, observing:

> The development of the harbor of Baltimore according to a comprehensive plan, by which the commerce of the port will be most advantageously served, and its future growth encouraged, is a project of distinctively public interest and purpose. It is concerned with the improvement and extension of a harbor service which constitutes an essential part of a system of water transportation connecting the port of Baltimore with the markets of the world. The public character of the use to which harbor structures are devoted is not affected by the fact that they may not all be made available for the indiscriminate use of the public.

Marchant v. Mayor & City Council of Baltimore, 126 A. 884, 887 (Md. 1924).

Despite redevelopment efforts in the 1920's, by 1954 the harbor, and the city, were struggling. At the time, the Inner Harbor area was still dominated by warehouses and other facilities related to shipping. Most (but not all) of these facilities were blighted, due in part to the fact the largest ships required wider berth than the Inner Harbor can afford, and due in part to the fact that many of the facilities were owned by railroads, which at the time lacked the capital to update them for use in the contemporary shipping industry. In downtown Baltimore, which had arisen around the Inner Harbor, the post-war years brought steadily declining property values and business closures. For a period of twenty years during and after the war, downtown employment was stagnant. Six major employers moved out of downtown during the post-war decade. In 1954, there were two million square feet of vacant loft and warehouse space in the downtown area alone, with vacancy rates as high as 25 percent on many

downtown blocks. H.L. Mencken is reported to have described downtown Baltimore, his birthplace and beloved hometown, as "the ruins of a once-great medieval city."

C. The revitalization of downtown begins.

The closure of O'Neill's department store in 1954, the year that this Court decided *Berman v. Parker*, became a catalytic event. A group of business leaders formed the Greater Baltimore Committee and the Committee for Downtown, which, in close partnership with the City, developed a plan for the revitalization of downtown Baltimore. Among the leaders from the business community was James Rouse, the real estate developer and visionary who would later found the Rouse Company. The renewal plan was to unfold in two stages. Its first phase involved the redevelopment of a 22-acre section of downtown that became known as Charles Center. In 1958, the City Council adopted an urban renewal plan for Charles Center pursuant to which the City provided $25 million in working capital and authorized the acquisition of any property within the redevelopment area by eminent domain. In the early 1960's, just as many of the elements of Charles Center were coming into place, the plan's second phase began. This second phase, even more ambitious than the first, was understood from the beginning to be the linchpin of the plan's overall success: the complete redevelopment of the Inner Harbor.

Throughout the redevelopment process, Baltimore voters consistently and directly reaffirmed their own determination that the Inner Harbor project served a "public" purpose by approving referenda to provide funding for the project. In the 1964 election, Baltimore voters

approved a $2 million bond issue to begin the implementation of the Inner Harbor Master Plan. In a 1966 referendum, the voters approved a loan of an additional $12 million.

The City also worked closely with the private and not-for-profit sectors. In 1964, the City entered into a contract with Charles Center-Inner Harbor Management, Inc. ("CC-IH"), which had been formed as a private corporation for the purpose of managing downtown redevelopment. Pursuant to that contract, CC-IH reported to the City's Commissioner of Housing and Community Development. In all acquisitions of land recommended by CC-IH, the City would hold title, and in all sales of land, the City would obtain the proceeds. All agreements with third parties, including real estate developers, would require approval of the City's Board of Estimates.

D. The City Council adopts urban renewal plans for the Inner Harbor, permitting the City to acquire approximately one thousand properties by purchase or condemnation.

In 1967, the Baltimore City Council approved the urban renewal plan for Inner Harbor Project I, which covered the area immediately surrounding the Inner Harbor that today contains, among other things, Harborplace, the Maryland Science Center, the home port of the historic U.S.F. Constellation, and the Christ Lutheran Church Harbor Apartments, which provide 288 units of housing for low-income senior citizens. In 1971, the Council approved a second renewal plan for an area described as Inner Harbor West – an area that today contains the Baltimore Convention Center and the Edward G. Garmatz United States Courthouse. Later that year, a third plan was

approved for an area known as Inner Harbor East, which today contains the National Aquarium. These renewal plans provided for the acquisition of approximately 240 acres, divided into approximately one thousand separate parcels, all of which would be subject to taking by eminent domain.[3]

The ordinances approving Inner Harbor Project I and Inner Harbor West both contained explicit findings of blighted and unhealthful conditions. In connection with Project I, the City Council found that "certain conditions exist within the downtown Inner Harbor Section of the City of Baltimore which constitute a serious and growing menace, injurious and inimical to the general welfare of residents of the City and that the redevelopment of [the area] represents the most effective way of halting the deterioration and beginning the revitalization." However, notwithstanding the predominance of blight both in the downtown and Inner Harbor areas, the Charles Center and Inner Harbor plans together entailed the relocation of more than seven hundred at least marginally viable businesses, including the Baltimore's main wholesale produce market, the state tobacco warehouse, and an operating fish-oil refinery.

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[3] The practice in Baltimore remains today for the City to develop a proposed comprehensive plan, designating specific parcels of land for acquisition by purchase or condemnation. The City Council may then adopt, reject, or amend the proposed comprehensive plan.

E. The Maryland Court of Appeals reaffirms that the development of the Inner Harbor is a "public purpose."

Early in the implementation of the plan, the Court of Appeals of Maryland had occasion to determine whether the revitalization of the Inner Harbor was a "public purpose" under the provision of the state constitution allowing the State of Maryland to contract debt, give credit, collect taxes, and expend funds for such a purpose. Although the City was the primary mover in the redevelopment of the Inner Harbor, the Maryland Port Authority had undertaken the development of an office tower dedicated to shipping and trade at the harbor's edge, one of the project's most significant components. In holding that the Port Authority's development of the "World Trade Center" was a public purpose, the court deferred to legislative findings "that the unification at a single, centrally located site of servicing functions and activities connected with water-borne commerce and trade has the single object of preserving the economic well-being of the State and is in the public interest." *Lerch v. Maryland Port Auth.*, 214 A.2d 761, 765 (1965).

The Court of Appeals rejected the plaintiffs' suggestion that while the development of wharves, docks, piers, and warehouses approved in 1924 in the *Marchant* case, quoted above, represented a public purpose, the development of an office tower did not: "The short answer to this contention is that the methods by which a public purpose is served change with the times; in the world of today, services are often more important than edifices." *Lerch*, 214 A.2d at 766. Moreover, the court held that "the validity of the means chosen to carry out a public purpose does not depend upon proof that the means will be successful. The

favorable outcome of economic measures can no more be demonstrated in advance than can the postulates of social legislation. It is for the legislature, not the courts, to make the determination." *Id.* at 767. The Port Authority did not break ground at the World Trade Center site until 1973. Completed in 1977, the 28-story pentagonal structure, designed by I.M. Pei, remains today the signature architectural element of the Inner Harbor.

F. With the approval of the voters, and in collaboration with the private sector, the City rebuilds the Inner Harbor.

Following the City Council's adoption of the Inner Harbor renewal plans in 1968 and 1971, the citizens of Baltimore directly approved the development of both the National Aquarium and Harborplace in referenda conducted in 1975 and 1979. Both votes were preceded by substantial grassroots activism and widespread public debate. The 1979 vote to approve the Rouse Company's development of Harborplace, in the face of strong and well-organized opposition, by a margin of 58 percent to 42 percent, garnered more public attention than that year's mayoral election. Today, the Aquarium alone receives 1.6 million visitors each year.

Throughout the redevelopment of the Harbor, the City worked in close collaboration with developers from the private sector, and, as in New London, much of the land that the City acquired was relatively quickly returned to private ownership. Immediately adjacent to the Harbor, and within the Project I renewal area, the City had created "superblocks," large parcels of land comprising entire city blocks that had been assembled from multiple smaller parcels of land and from internal networks of alleys and

backstreets that had divided those smaller parcels. These superblocks were created for the specific purpose of attracting large-scale private development.

The original Inner Harbor Master Plan in the 1960's had anticipated the development of a new hotel within the area of Inner Harbor Project I. At the personal insistence of then-Mayor William Donald Schaefer, among others, City developers sought to attract a hotel to one of the new superblocks. This proved to be one of the project's most difficult tasks. After deals with two developers fell through, and after intense personal negotiations between Mayor Schaefer and A.N. Pritzker, whose family then owned the Hyatt Corporation, the City made an extraordinary offer: the City would loan Hyatt $12 million at 7% interest, including $10 million obtained from the U.S. Department of Housing and Urban Development through an Urban Development Action Grant; the City would build a parking garage to service the proposed hotel at a cost of $4 million; and the City would guarantee to Hyatt a minimum occupancy rate during the initial years of the hotel's existence. In return, the City would be entitled to a share of the hotel's profits. In the first year of its existence, the Baltimore Hyatt was the most successful hotel in the Hyatt chain. Until Hyatt repurchased the City's interest, the City's share in the hotel brought it an average of $2.4 million in net profits per year. By the 1990's, as a direct result of the Inner Harbor redevelopment, the tourism industry had evolved from near-insignificance in Baltimore's overall economy into the second largest employer in the city.

G. The courts ensure that property owners receive "just compensation."

During the acquisition phase of the project, the courts protected the interests of property owners by ensuring that no property was taken by the city without just compensation. For example, in 1972, pursuant to the Inner Harbor West project, the City acquired the land that is today home to the federal courthouse. At the time, these properties consisted mostly of loft buildings used for light manufacturing or wholesale trade. When the City condemned a parking lot in the area, the owner of the property objected to the City's offer of compensation. At trial, the City argued that, in 1972, the "highest and best use" of the property was, in fact, as a parking lot. On the other hand, the owner claimed that, by 1972, he had "looked around to the extensive redevelopment effort that had been going on in downtown Baltimore for some two decades, adjudged that his property and the block of which it was a part was next in line for major renewal and redevelopment, and thus believed that the highest and best use for the property was a high-rise office building." *Mayor & City Council of Baltimore v. Smulyan*, 41 A.2d 198, 200 (Md. Ct. Spec. App. 1979).

The City's experts testified at trial that the property was worth between $400,000 and $420,000 in 1972. The owner's experts testified that the property was worth between $745,880 and $840,000. In 1979, the Court of Special Appeals affirmed a jury verdict awarding the owner an even greater sum, $895,104. *See id.* In effect, the jury had determined that the mere existence in 1972 of redevelopment efforts to the east of Mr. Smulyan's property, in the Inner Harbor Project I renewal area, had more

than doubled the value of Mr. Smulyan's land, and the appellate court upheld this determination.

Even counsel for Ms. Kelo, *et al.* have recognized, in writings outside of this case, that the Inner Harbor has created substantial new economic opportunities for the citizens of Baltimore, and have argued for the expansion of those opportunities. According to counsel, "Baltimore during the early 1980's witnessed somewhat of a renaissance, spurred by the development of the Inner Harbor area into a major tourist attraction with shopping and a world class aquarium." Scott G. Bullock, Institute for Justice, *Baltimore: No Harbor for Entrepreneurs* (1997). Counsel's prescription for Baltimore is not to forego large-scale redevelopment projects, but instead to amplify the effects of these projects by removing restrictions on entrepreneurs. See *id.* (arguing that the City of Baltimore should promote economic development by deregulating pushcart vending, horse-drawn cart vending, newspaper vending, vehicles for hire, and cosmetology and hairbraiding businesses, and that deregulation would be particularly effective in the Inner Harbor, "the most potentially lucrative market in downtown Baltimore").[4]

By 2000, sixty projects of new construction or rehabilitation had been completed in the Inner Harbor renewal areas, including fifteen office buildings, twelve hotels, and ten museums. The project has stimulated private development in downtown Baltimore, leading to the creation of tens of thousands of new jobs. As architectural critics recognized in a 1992 article, "What 30 years ago was a

[4] Available at www.ij.org/pdf_folder/city_studies/ij_city_study_baltimore.pdf.

collection of decaying docks, empty sheds, and unsightly parking lots surrounding a debris-filled river has become the city's symbolic centerpiece, attracting millions of people a year from all over the world." Brian Kelly and Robert K. Lewis, *What's Right (and Wrong) About the Inner Harbor*, Planning, April 1992, at 28. The project has served as a model for waterfront redevelopment projects on a comparable scale in other port cities, including Sydney, Barcelona, Belfast, and Rotterdam.

II. The Balance Struck by this Court in *Berman v. Parker* Enabled the Revitalization of the Inner Harbor and Should Not Be Disturbed.

This Court's central concern in its unanimous decision in *Berman v. Parker* was with striking the proper balance between legislative and judicial authority in determining what represents a "public use." The Court's holding could not have been more clear: "Subject to specific constitutional limitations, *when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive*. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating local affairs." *Id.*, 348 U.S. at 32 (emphasis added);[5] *see also Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241

[5] There were few people as well-acquainted with the problems facing industrial cities generally in 1954, and Baltimore in particular, than the lawyer who argued *Berman* on behalf of the District of Columbia. Simon Sobeloff, who was then Solicitor General of the United States, and who went on to serve as Chief Judge of the U.S. Court of Appeals for the Fourth Circuit, had served as City Solicitor of Baltimore from 1943 to 1947.

(1984) ("[T]he court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'").

In Maryland, the citizens' elected representatives, both in the Baltimore City Council and in the Maryland General Assembly, repeatedly voted to devote public funds and to allow the exercise of the power of eminent domain to achieve the objectives of the Inner Harbor renewal plans. Moreover, on at least four occasions, the citizens of Baltimore themselves directly voted to authorize the issuance of bonds to finance various components of the project. In *Lerch v. Maryland Port Authority*, discussed above, the question of whether the construction of an office tower on the banks of the Inner Harbor constituted a "public purpose" reached the Court of Appeals, but the court recognized its limited role in providing an answer: citing both the enactment of legislation by the General Assembly and the City's overall redevelopment plan, the Court of Appeals acknowledged that "[i]t is for the legislature, not the courts, to make the determination." *Id.*, 214 A.2d at 767.

In the case presently before the Court, what is at stake, quite simply, is the *institutional locus* for determining, for example, in 1967 (when the Baltimore City Council adopted the urban renewal plan for Inner Harbor Project I), whether it was in the "public interest" for the City of Baltimore to undertake the redevelopment of the Inner Harbor. In urging a far more robust "public use" jurisprudence under the Takings Clause, the petitioners would shift central responsibility for determining whether an economic development project serves a public purpose from the legislature to the judiciary. Under this view, in 1967, it would have been for the Court of Appeals of

Maryland, or for this Court, to determine whether it served the public interest for the City of Baltimore to acquire 240 acres of old industrial and waterfront property and attempt to renew its downtown through a dramatic program of new construction and through intensive and shifting collaborations with the private sector.

The City of Baltimore respectfully submits that, as both a constitutional and a practical matter, it is for the people of Baltimore and their elected representatives to make that determination, not the courts. Under a system of separation of powers, the legislature's role *is* to determine what is in the public interest. However difficult to discern, or even inchoate, the "public interest" may be, it is the legislature's job to decide what the public interest is. No other institution can legitimately make that determination.

Moreover, making a sound decision about whether to go forward with a project like the Inner Harbor requires the collection of an enormous amount of information in an array of disciplines and the solicitation of a vast amount of expert advice. Ultimately, a legislature can acquire the essential knowledge more competently than a court. It is a necessary implication of the petitioners' argument that, in 1967, a judicial fact-finder, backed up by an appellate court reviewing factual findings for abuse of discretion, would have rendered a more effective decision about whether to revitalize the Inner Harbor than the citizens' elected representatives in the Baltimore City Council or the Maryland General Assembly. That is an untenable, and inherently undemocratic, proposition.

The judiciary's fundamental role, of course, is not to determine what the "public interest" is, but rather to

safeguard individual rights under the Constitution and the common law. The text of the Takings Clause itself explicitly denotes the judiciary's proper role in this context: to ensure that no "private property [shall] be taken for public use, *without just compensation*." In other words, the constitutional text itself reflects a particular vision of the proper allocation of institutional responsibility in the exercise of the power of eminent domain. The text does not explicitly proscribe the taking of property for something other than a "public use"; rather, *it assumes the validity of the legislature's determination that the taking is "for public use."* What the text instead proscribes is the denial of "just compensation" in the event of such a taking.

It is, of course, squarely within both the proper role and the competency of the judiciary to determine whether a property owner has been justly compensated. The *Smulyan* case, cited above, demonstrates this as well as any. There, the Court of Special Appeals of Maryland affirmed the determination of a jury that an owner of property in the Inner Harbor West renewal area was entitled to more than twice the dollar amount that he had been offered by the City of Baltimore. Indeed, in *Smulyan*, the court allowed the jury to ascribe value to the property that the owner himself acknowledged had been created by the very revitalization effort pursuant to which the property was being taken. *See id.*, 41 A.2d at 200 (crediting property owner's contention that he had "looked around to the extensive redevelopment effort that had been going on in downtown Baltimore for some two decades, adjudged that his property and the block of which it was a part was next in line for major renewal and redevelopment, and thus believed that the highest and best use for the property was a high-rise office building").

As *Smulyan* demonstrates, the judiciary has the primary role in ensuring just compensation, and, in a trial on this issue, a court properly treats the government's assertions regarding the value of the property just as those of any other litigant in a property dispute. On the issue of whether the taking is for a "public use," however, the government's "claims" must be regarded, for both practical and constitutional reasons, as "well-nigh conclusive." *Berman*, 348 U.S. at 32. As this Court recognized in *Berman*, "The role of the judiciary in determining whether that power [of eminent domain] is being exercised for a public purpose is an extremely narrow one." *Id.*, 348 U.S. at 32. The Court should reaffirm that principle.

The petitioners urge judicial skepticism of legislative determinations of the "public interest" in two particular respects that would have immeasurably complicated the revitalization of the Inner Harbor. First, the petitioners would require that a local government be able to identify with "reasonable certainty" the use to which an acquired property would be put. In Baltimore, the Inner Harbor project proceeded according to detailed plans, but flexibility nonetheless was required. Plans for the Inner Harbor were first drawn up in the late 1950's. The City Council did not authorize the acquisition of properties in the Inner Harbor renewal area until 1967. Construction of the Harbor's main elements continued into the early 1980's. To take a specific example, the land where the National Aquarium now stands was acquired by the City in the early 1970's, but it was not until 1975 that the voters authorized the issuance of bonds to fund the Aquarium's construction. The Aquarium opened its doors in 1981. To take another example, as late as 1985, the City's Planning Department predicted that the site where Oriole Park at

Camden Yards now stands would be used for residences, a hotel, and offices. The State of Maryland acquired the brick warehouse that became the signature architectural element of the ballpark in 1991, through condemnation (reaching a settlement with the property owner on "just compensation" of $11 million). The ballpark opened in 1994. Large scale projects require substantially greater flexibility than the petitioners would allow.

Second, under the petitioners' most extreme formulation of their argument, the legislature would be categorically barred from determining that the taking of a "viable home" or a "viable business" would serve the public interest. *See* Br. of Pet. at 26, 33. The adoption of this argument would essentially overrule the central holding of *Berman v. Parker* – that the legislature (Congress) was entitled to deference when it determined that the acquisition of an entire area for the purpose of removing urban blight was "for a public use," even if numerous individual properties within that area were not themselves blighted. Thus, the petitioners seek to undermine both the basic principle of legislative deference that emerged from *Berman v. Parker* and the precise application of that principle to the facts in the case. In 1982, after the Baltimore City Council had adopted an urban renewal plan for the Middle Branch, another waterfront area along the harbor, the Court of Appeals was asked by an owner of Middle Branch industrial property to hold that the City could not constitutionally take property pursuant to the urban renewal plan if the objective of the particular taking was industrial or economic development. The Court of Appeals rejected that argument, noting that such a holding "would eviscerate thirty years of the City's progress in combating the diseases of 20th century urban America." *Mayor & City*

Council of Baltimore v. Chertkof, 441 A.2d 1044, 1053 (Md. 1982). Had the petitioners' argument been the law for the past half-century, rather than *Berman v. Parker*, the present day Inner Harbor, quite simply, could not have emerged from the network of decaying warehouses and wharves that, in 1954, only harkened back to an earlier heyday.

III. The Necessity for Government-Sponsored Economic Development Activity Is No Less Today Than When the Inner Harbor Was Redeveloped.

Despite the massive reinvestment and job creation in downtown Baltimore that occurred as a result of the revitalization of the Inner Harbor, the project has not, of course, been a panacea for Baltimore's problems. There are census tracts in both East and West Baltimore that today remain some of the poorest in the country, with high rates of poverty, addiction, and crime. The problems of these neighborhoods have primarily been caused by the disappearance of employment opportunities since World War II. *See* Wilson, *When Work Disappears*, *supra*, at xiii ("A neighborhood in which people are poor but employed is different from a neighborhood in which people are poor and jobless. Many of today's problems in the inner-city ghetto neighborhoods – crime, family dissolution, welfare, low levels of social organization, and so on – are fundamentally a consequence of the disappearance of work."). A substantial proportion of the building stock in East and West Baltimore is blighted and abandoned, but the City's goals for these neighborhoods go beyond the mere removal of blighted properties. Rather, the City measures its success in East and West Baltimore according to the well-being and productivity of the people who live there. In East and

West Baltimore, blight and abandonment have occurred *precisely because economic development has not occurred*, and so, in Baltimore at least, urban renewal and economic development go hand in hand. *Both* are public purposes.

East Baltimore alone was once home to thousands of workers in the shipping, steel, and automotive industries. The presence of those industries in the city's economy is now a fraction of what it once was. Baltimore, with a current population of 640,000, lost 75,000 jobs in manufacturing alone between 1953 and 1984. The disappearance of industrial employment is written on the face of neighborhoods, in the form of abandoned and blighted properties. It also appears unmistakably in economic indicators of neighborhood well-being. In 2000, unemployment rates in East Baltimore's poorest census tracts ranged from twenty to thirty percent (compared to a citywide rate of ten percent and a current statewide rate of 3.9 percent). Only about forty percent of working age adults in these census tracts were actually employed (compared to 58 percent citywide).[6] *Cf.* Wilson, *supra*, at xiii (recognizing that, "[f]or the first time in the twentieth century most adults in many inner-city ghetto neighborhoods are not working in a typical week"). In East Baltimore, the cycle of disinvestment has taken hold despite the presence of the Johns Hopkins University medical campus. Residents of East Baltimore live, often quite literally, in the shadow of the country's top-ranked research hospital, yet they have been

[6] See Baltimore Neighborhood Indicators Alliance, *Vital Signs: Measuring Baltimore's Progress Toward Strong Neighborhoods and a Thriving City* 40-41 (2004), available at www.bnia.org/PDF/0.%20VITALSIGNS3_ALL_FINAL.pdf.

isolated for decades from opportunities for meaningful employment and economic advancement.

The City of Baltimore is currently trying to address these problems through the development of a center for biotechnology on thirty acres in a seriously blighted section of the city, adjacent to Johns Hopkins. It is hoped that this biotechnology center, with approximately two million square feet of space for research and business activities, will both complement existing activities at Johns Hopkins and generate substantial new opportunities for neighborhood residents. The City estimates that the new development will create six thousand new jobs, about one-third for individuals whose highest level of education is a high school diploma or equivalent.

The City is currently acquiring land for the proposed biotechnology center through both purchase and eminent domain. Of the approximately 1,700 total properties that the City expects to acquire in East Baltimore, approximately 1,150, or about two-thirds, are abandoned, while approximately 550 are currently- or recently-occupied private homes or businesses. The acquisition phase of the project has been accompanied by an intensive program of outreach to neighborhood residents, focused both on facilitating the relocation process and on workforce development.

The City, through its elected officials, has decided to pursue the development of a biotechnology center, a project that simply could not take place in an area divided into 1,700 separate parcels of land if the City were unable to exercise its power of eminent domain. The courts can and must protect individual property owners by ensuring that they are given "just compensation" for their land. But

it is for the people of Baltimore and their elected representatives, not the courts, to determine whether the East Baltimore biotechnology center is a "public use" of the land where the center will be located.

For Baltimore to continue its redevelopment efforts, it needs the flexibility that this Court's Takings Clause jurisprudence affords. Petitioners invite the Court to depart radically from that jurisprudence. The City of Baltimore respectfully urges the Court to decline that invitation and to reaffirm the deference that is due to government decisions in this critical area.

CONCLUSION

For the reasons stated, *amicus*, the City of Baltimore, respectfully urges that the judgment below be affirmed.

Respectfully submitted,

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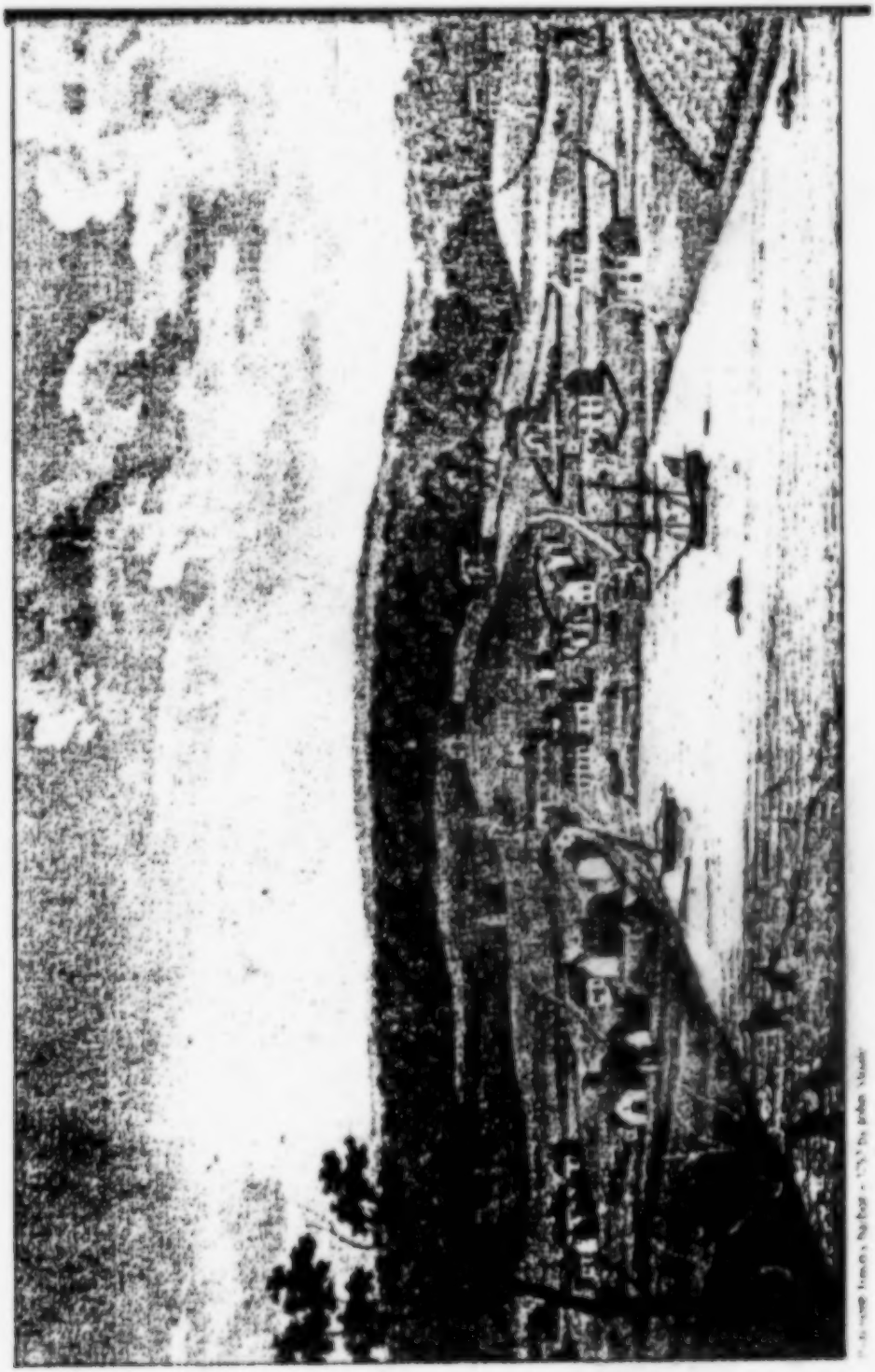

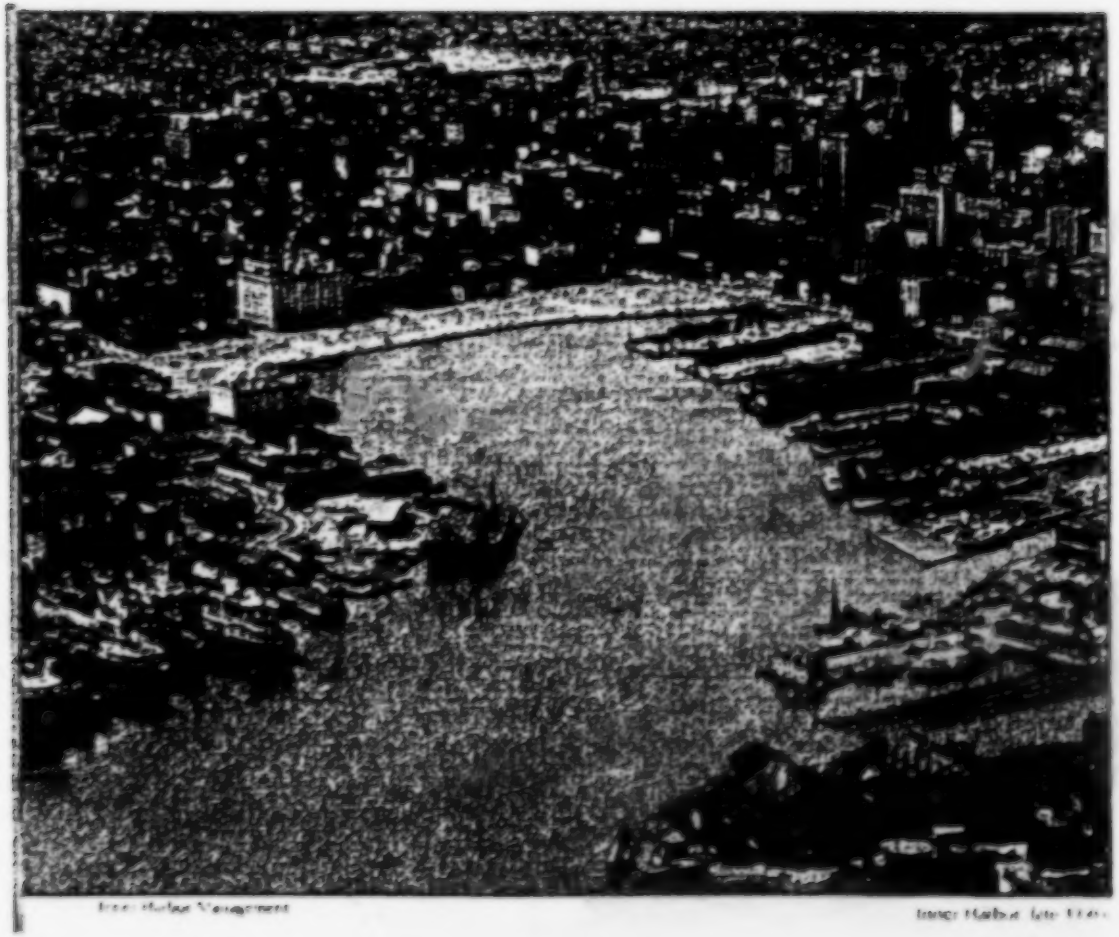

App. 2

Inner Harbor, 1984